IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 667 of 2001
(Old No. 1672 of 2000)

1. Ashok Kumar
   S/o Bahadur Singh
   R/o Labour Colony, Suti Mill,
   Kashipur, Distt. Udham Singh Nagar.
2. Maya D/o Roshan Lal
3. Smt. Kiran D/o Roshan Lal
   Both R/o Basti Beria, Bazapur,
   District Udham Singh Nagar.

…….. Appellants

Versus

The State

…….. Respondent

Alongwith

Criminal Appeal No. 2066 of 2001
(Old No. 156-D of 2000)

Ashok Kumar
S/o Bahadur
R/o Soot Mill Kashipur
Distt. Udham Singh Nagar.

…….. Appellant

Versus

The State

……. Respondent

Mr. Kuldeep Singh Rawal (Amicus Curiae) for the appellants.
Mr. S.S. Adhikari, learned A.G.A. for the respondent State.

Hon'ble Prafulla C. Pant, J.

These two appeals, preferred under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as Cr.P.C.), are directed against the judgment and order

dated 06.07.2000, passed by learned II Additional Sessions Judge, Nainital, in Sessions trial No. 519 of 1996, whereby accused / appellants Ashok Kumar, Maya and Smt. Kiran have been convicted under Section 366 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred as I.P.C.), and accused / appellant Ashok Kumar is also convicted under Section 376 of I.P.C. Each one of the three convicts under Section 366 of I.P.C. have been sentenced to undergo rigorous imprisonment for a period of five years and also to pay fine of Rs. 2,000/-, in default of payment of which, the defaulter is directed to undergo rigorous imprisonment for a further period of six months. Accused / appellant Ashok Kumar has also been sentenced under Section 376 of I.P.C. to undergo rigorous imprisonment for a period of seven years and also to pay fine of Rs. 2,000/-, on this count also. In default of payment of fine he is further directed to undergo rigorous imprisonment for a period of six months. Both the sentences awarded against accused / appellant Ashok Kumar are directed to run concurrently by the trial court.

2) Heard learned counsel for the parties and perused the entire evidence on record.

3) Prosecution story, in brief, is that Brahmadev Sharma (P.W. 2) lodged a first information report with police station Bazpur, on 06.05.1993, at about 03:45 P.M., in which it is alleged that his daughter Khillo (P.W. 1) has ran away from her house in the intervening night of 29th / 30th of April 1993, with the assistance of Kiran and Maya. It is also alleged that accused Ashok Kumar had abducted the girl. Said first information report was registered as crime No. 463

of 1993 against all the three accused along with one Roshan, relating to offences punishable under Section 363 / 366 of I.P.C. P.W. 4 Sub Inspector Naresh Chandra investigated the crime and recovered the girl (Khillo) on 05.06.1993, at about 06:30 A.M., from the custody of accused / appellant Ashok Kumar, near Doraha bus stand in Bazpur. She was got medically examined at about 04:30 P.M. on that very day i.e. 05.06.1993. P.W. 3 Dr. B Verma examined Km. Khillo. After interrogating the witnesses, the Investigation Officer submitted charge sheet against the accused / appellants Ashok Kumar, Maya and Kiran, for their trial in respect of offences punishable under Section 363 / 366 and 376 of I.P.C.

4) The Magistrate, on receipt of the charge sheet, after giving necessary copies to the accused, committed the case to the court of sessions, for trial. Learned I Additional Sessions Judge, Nainital, after hearing the prosecution and the defence, framed charge of offences punishable under Section 366 / 34 against all the three accused, and as against accused Ashok Kumar additional charge of offence punishable under section 376 of I.P.C., was framed. All the three accused pleaded not guilty and claimed to be tried. On this, prosecution got examined P.W. 1 Khillo (the victim); P.W. 2 Brahmadev Sharma (informant and father of the victim); P.W.3 Dr. B. Verma (who medically examined the girl) and P.W. 4 Sub Inspector Naresh Chandra (the Investigating Officer). The oral and documentary evidence was put to the accused under Section 313 of Cr.P.C., in reply to which all the three accused alleged the same to be false. However, no evidence in defence was adduced on behalf of

the accused. The trial court, after hearing the parties, found all the three accused guilty of charge of offences punishable under section 366 of I.P.C. Accused / appellant Ashok Kumar was further found guilty of offence punishable under Section 376 of I.P.C. After hearing on sentence, each one of them has been convicted and sentenced by the trial court, as mentioned above. Aggrieved by said judgment and order these appeals were filed before the Allahabad High Court, from where these are received by transfer to this Court, under Section 35 of the U.P. Re-organization Act, 2000, for their disposal.

5) Before further discussions, it is pertinent to mention about the medical report (Ext. A –3) prepared by P.W. 3 Dr. B. Verma on examination of the victim (Khillo) on 05.06.1993. According to this report pubic and axillary hair of the girl were well developed. Breasts fully developed. Number of teeth 14 / 14. No external injury was seen in any part of the body. Hymen was found completely ruptured. Vaginal orifices admitting two fingers easily. No discharge found on any part of body or clothes. The Medical Officer (P.W. 3 Dr. B. Verma) in her examination on oath stated that the girl was 16 – 17 years old.

6) Learned Amicus Curiae appearing on behalf of the appellants argued that the girl was a consenting party to the sexual intercourse and accused / appellant Ashok Kumar got married to her. However, to know whether she was consenting party or not, statement of the girl herelf is the most relevant evidence. P.W. 1 Khillo has stated on oath before the court below that Ashok Kumar committed rape on her. She has further stated that sexual intercourse was

committed with her against her will. As such, in view of the statement of the girl which appears to be her natural statement, it cannot be accepted that the girl was a consenting party in the sexual intercourse with the accused / appellant Ashok Kumar. This Court agrees with the trial court that the charge of rape is fully proved against accused / appellant Ashok Kumar.

7) However, as to the conviction under Section 366 of I.P.C. against accused / appellants Maya and Kiran, Mr. Kuldeep Singh Rawal, learned Amicus Curiae argued that the charge is not proved against the two. In this connection, he further submitted that mere asking a girl to marry someone does not amount to abduction of the girl. He relied on the principle of law laid down in ***Gabbu Vs. State of Madhya Pradesh; reported in 2006 Supreme Court Cases (cri) Vol. III pg. 71.*** In said case also a lady accused / appellant had departed after the alleged abduction. In the present case, P.W. 1 herself states that about a month before the incident, she had gone to Chaiti festival where Maya and Kiran asked her to marry Ashok Kumar. She further states that she did not agree to it and went to her house. After a month, when she had gone to participate in a ladies Sangeet party in Babu Ram's house, again, the two ladies asked her to marry Ashok Kumar. It has also come in her statement that when she went with Kiran and Maya she did not inform anything to her parents. As to that act she simply says that Ashok Kumar took her, Maya and Kiran with him. P.W. 1 Khillo has stated that it was Ashok who, on the point of knife threatened her, and asked her to accompany him. From the above statement of P.W. 1 Khillo, it cannot be said

that accused / appellants Maya and Kiran, abducted the girl. What has been proved against the two women appellants is that they requested the girl to marry Ashok Kumar. Mere that much is not satisfactory to constitute an offence punishable under section 366 of I.P.C. Therefore, this Court is of the view that accused / appellants Maya and Kiran cannot be said to have committed abduction of Khillo.

8) For the reasons, as discussed above, while the appeal of accused / appellant Ashok Kumar is liable to be dismissed, the appeal filed on behalf of accused / appellants Maya and Kiran deserves to be allowed. Accordingly, their appeal is allowed. The impugned judgment and order dated 06.07.2000, is set aside to the extent of conviction of accused / appellants Maya and Kiran under Section 366 of I.P.C. The two are acquitted of the charge of offence punishable under section 366 of I.P.C. They are on bail. They need not to surrender. Their bail bonds and cancelled and sureties stands discharged.

9) The appeal of accused / appellant Ashok kumar is dismissed. It is reported that he had already served out the sentence awarded to him. The accused / appellant Ashok Kumar shall be released forthwith, if not wanted in connection with any other crime. Registry of this Court to inform the Superintendent of the jail concerned and also to the court concerned.

(Prafulla C. Pant, J.)

Dt. April 23, 2007
H.Negi